

MAYOR & COUNCIL AGENDA COVER SHEET

MEETING DATE:

June 2, 2003

CALL TO PODIUM:

Fred Felton,
Assistant City Manager

RESPONSIBLE STAFF:

Fred Felton,
Assistant City Manager

AGENDA ITEM:

(please check one)

<input type="checkbox"/>	Presentation
<input type="checkbox"/>	Proclamation/Certificate
<input type="checkbox"/>	Appointment
<input type="checkbox"/>	Public Hearing
<input type="checkbox"/>	Historic District
<input type="checkbox"/>	Consent Item
<input type="checkbox"/>	Ordinance
<input type="checkbox"/>	Resolution
<input type="checkbox"/>	Policy Discussion
<input type="checkbox"/>	Work Session Discussion Item
<input checked="" type="checkbox"/>	Other: Public Discussion

PUBLIC HEARING HISTORY:

(Please complete this section if agenda item is a public hearing)

Introduced	
Advertised	
Hearing Date	
Record Held Open	
Policy Discussion	

TITLE:

A Public Discussion Concerning Montgomery County's Proposed Legislation to Prohibit Smoking in Eating and Drinking Establishments

SUPPORTING BACKGROUND:

As the Mayor and Council are aware, the Maryland Court of Appeals recently overturned the County Board of Health's 1999 regulation prohibiting smoking in eating and drinking establishments.

The County Council is scheduled to hold a public hearing on a new bill and Board of Health regulation on June 12, 2003 that would again attempt to prohibit smoking in eating and drinking establishments. If it is passed as normal legislation, it would not apply in the City of Gaithersburg. If passed as a Board of Health regulation, the County has taken the position that it will apply in the City.

Four County Council Members sponsored the bill. Of course, we do not know what, if any, changes will be made during the public hearing process or whether the bill will pass. Additionally, we do not know the County Executive's position on the proposed legislation, but it is noteworthy that he vetoed the 1999 bill.

For your review, I have attached a cover memo from Montgomery County Senior Legislative Attorney Michael Faden and the package that was submitted to County Council Members when the bill was introduced.

(Continued on page 2)

DESIRED OUTCOME:

Hear presentation and provide the public an opportunity to comment.

SUPPORTING BACKGROUND: (cont'd)

Some options for the City at this point include the following:

- Repeal our existing smoking ordinance, and Tillie Frank the County smoking ordinance (Chapter 24). Under this option, any changes to the County law would automatically apply in the City.
- Correspond with the County Council and ask them not to consider the Smoking Ban as a Board of Health issue. Remind the County Council that Gaithersburg has always had responsible smoking laws, and notify them that we will be considering our own code amendments
- Move forward with introducing a smoking ban similar to the one proposed by the County, and schedule a public hearing in the near future.
- Move forward with new smoking ordinance based on the Howard County model in which smoking is allowed in enclosed areas with separate ventilation systems.

May 13, 2003

Introduction

MEMORANDUM

TO: County Council

FROM: *MF* Michael Faden, Senior Legislative Attorney

SUBJECT: *Introduction:* Bill 15-03, Smoking – Eating and Drinking Establishments
Resolution to adopt Board of Health Regulation restricting smoking in restaurants

Councilmembers Andrews, Floreen, Leventhal and Perez intend to introduce Bill 15-03, Smoking – Eating and Drinking Establishments, on May 13. Bill 15-03 would prohibit smoking in all eating and drinking establishments (restaurants, cafeterias, dinner theaters, school and institutional food service facilities) except certain private clubs with liquor licenses. This bill would fall within the scope of the non-preemption clause in the state restaurant smoking law (see state law on © 13, particularly editors note on © 14). The sponsors directed Council staff to draft and advertise, for discussion purposes, amendments eliminating the private club exemption and extending the prohibition to outdoor serving areas (see amendments, © 12).

Councilmembers Andrews, Floreen, Leventhal and Perez also expect to introduce a resolution to adopt a similar Board of Health regulation, so that both the bill and the regulation may be considered at the same public hearing. Similar amendments may also be considered to this regulation as those shown on ©12. While an essentially identical board of health regulation was declared invalid by the Maryland Court of Appeals in the *Anchor Inn* case (see © 17), a county law passed after the *Anchor Inn* case was argued in Council staffs' view, restores the authority of the Council acting as the Board of Health to adopt this kind of regulation (see Bill 20-00 © 27).

The Council has tentatively scheduled a public hearing on Bill 15-03 and the Board of Health regulation, for June 12 at 7:30 p.m.

This packet contains:

© number

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FABILLS\0315 Restaurant Smoking\0315 Intro.Doc

Bill No. 15-03
Concerning: Smoking - Eating and
Drinking Establishments
Revised: 5-6-03 Draft No. 1.5
Introduced: May 13, 2003
Expires: November 13, 2004
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Andrews, Floreen, Leventhal, and Perez

AN ACT to:

- (1) prohibit smoking in certain eating and drinking establishments;
- (2) repeal provisions of County law which require certain restaurants to designate non-smoking areas;
- (3) provide certain penalties for and procedures to enforce smoking restrictions; and
- (4) generally regulate smoking at eating and drinking establishments.

By amending

Montgomery County Code
Chapter 24, Health and Sanitation
Section 24-9

By repealing

Montgomery County Code
Chapter 24, Health and Sanitation
Section 24-9A

Boldface

Underlining

[Single boldface brackets]

Double underlining

[[Double boldface brackets]]

* * *

Heading or defined term.

Added to existing law by original bill.

Deleted from existing law by original bill.

Added by amendment.

Deleted from existing law or the bill by amendment.

Existing law unaffected by bill.

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 24-9 is amended and Section 24-9A is repealed as follows:**

2 **24-9. Smoking in public places.**

3 * * *

4 (b) *Smoking prohibited in certain public places.* A person must not smoke
5 in any:

6 * * *

7 (5) Theatre [(other than a dinner theatre)] or movie theater;

8 * * *

9 (8) Business or organization open to the public, including a retail
10 store, bank, office, factory, eating and drinking establishment, or
11 any other private business or organization [except an eating and
12 drinking establishment];

13 * * *

14 (c) *Exceptions.* Smoking is not prohibited by this Section:

15 * * *

16 (7) In the bar and dining area of an eating and drinking establishment
17 that:

18 (A) is a club as defined in the state alcoholic beverages law;

19 (B) has an alcoholic beverages license issued to private clubs
20 under the state alcoholic beverages law; and

21 (C) allows consumption of alcoholic beverages on its
22 premises.

23 (d) *Posting signs.*

24 (1) Signs prohibiting or permitting smoking, as the case may be,
25 must be posted conspicuously at each entrance to a public place
26 covered by this Section.

- (2) Where smoking is prohibited by this Section, the sign either must read "No smoking by order of Montgomery County Code § 24-9. Enforced by (department designated by the County Executive)" or be a performance-oriented sign such as "No Smoking" or "This is a Smoke Free Establishment." The international no-smoking symbol may replace the words "No smoking."
- (3) Signs need not be permanently attached to a structure. The owner and the person in control of the room or area are both responsible for posting the required signs.
- (e) *Duty to prevent smoking in certain areas.* The owner or person in control of a building or area covered by this Section must refuse to serve or seat any person who smokes where smoking is prohibited, and must ask the person to leave the building or area if the person continues to smoke after proper warning.
- (f) *Optional smoking restrictions.* The owner or person in control of any property not covered in subsection (b) or exempted under subsection (c) may prohibit or restrict smoking as provided in this Section by notifying, in writing, the department designated to enforce this Section and by posting appropriate signs. The Department must enforce the prohibition or restriction wherever signs are posted until the owner or person in control of the property notifies the department in writing that the owner or person in control has revoked the prohibition or restriction and removed all signs.
- (g) *Limitations.* This Section does not:
- (1) allow any person to smoke at any place where smoking is otherwise restricted; or

- 53 (2) prevent an owner or person in charge from prohibiting smoking
54 entirely at any business or workplace.
- 55 (h) *Other laws still apply.*
- 56 (1) This Section adds to, and does not replace or restrict, any other
57 applicable federal, state, or County law or regulation.
- 58 (2) This Section does not allow smoking where smoking is restricted
59 by any applicable fire prevention rule or regulation.
- 60 (i) *Regulations.* The County Executive may adopt reasonable regulations
61 under method (2) to enforce this Section.
- 62 (j) *Enforcement and penalties.*
- 63 (1) Any violation of this Section is a class C civil violation. Each
64 day a violation exists is a separate offense.
- 65 (2) The County Attorney or any affected party may file an action in a
66 court with jurisdiction to enjoin repeated violations of this
67 Section.
- 68 (3) The Director of the Department of Health and Human Services
69 may suspend a license issued under Chapter 15 for up to 3 days if
70 the Director finds, under the procedures of Section 15-16, that the
71 operator of an eating and drinking establishment has knowingly
72 and repeatedly violated any provision of this Section.
- 73 [24-9A. **Smoking in eating and drinking establishments.]**
- 74 [(a) **Definitions.** In this Section, the following words have the meanings
75 indicated:
- 76 (1) Bar means an indoor, enclosed area where the primary activity is
77 the service of alcoholic beverages and where the service of food
78 is only incidental to the service of alcoholic beverages.

- (2) Eating and drinking establishment means an establishment regulated under Chapter 15.
- (3) Enclosed means separated by walls or partitions.
- (4) Indoor means covered by a roof and enclosed.
- (5) Private function means an event in an enclosed area to which entry is not available to the general public but only to those whom the sponsor of the event invites. "Private function" does not mean an event held by a private club or association to which members of the general public are invited.]

[(b) Applicability.

- (1) This Section applies to an eating and drinking establishment if the total seating capacity of all non-bar areas is 50 or more.
- (2) This Section does not apply to any area of an eating and drinking establishment that is:
 - a. A bar; or
 - b. Being used exclusively for a private function.]

[(c) Nonsmoking area required. A person who operates an eating and drinking establishment must designate a contiguous, nonsmoking area that is at least 50 percent of the total seating area of that part of the establishment that is not:

- (1) A bar; or
- (2) Being used exclusively for a private function.]

[(d) Notice. Any person who operates an eating and drinking establishment subject to this Section must:

- (1) Post conspicuously at each entrance a sign stating that a nonsmoking area is available;

- 105 (2) Ask whether each patron wants to be seated in the smoking or
106 nonsmoking area;
- 107 (3) Refuse to seat or serve a person who smokes in a nonsmoking
108 area; and
- 109 (4) Ask a person who smokes in a nonsmoking area to leave the
110 establishment if the person continues to smoke after proper
111 warning.]

112 [(e) Prohibition. A person must not smoke in:

- 113 (1) An area that is designated for nonsmoking under this Section; or
114 (2) Any restroom that is open to customers.]

115 [(f) Enforcement and penalty.

- 116 (1) A person who operates an eating and drinking establishment in
117 violation of any provision of this Section may be punished for a
118 class C violation under Section 1-19.
- 119 (2) A person who smokes in a nonsmoking area in violation of this
120 Section may be punished for a class C violation under Section 1-
121 19.
- 122 (3) The Director of the Department of Health and Human Services
123 may suspend a license issued under Chapter 15 for up to 3 days if
124 the Director finds, under the procedures of Section 15-16, that the
125 operator of an eating and drinking establishment has knowingly
126 and repeatedly violated any provision of this Section.
- 127 (4) The County Attorney or any affected person may file an action in
128 any competent court to enjoin violation of this Section.]

129 *Approved:*

130

Michael L. Subin, President, County Council

Date

131 *Approved:*

132

Douglas M. Duncan, County Executive

Date

133 *This is a correct copy of Council action.*

134

Mary A. Edgar, CMC, Clerk of the Council

Date

Resolution No.:

Introduced:

May 13, 2003

Adopted:

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE MONTGOMERY COUNTY BOARD OF HEALTH

By: Councilmembers Andrews, Floreen, Leventhal, and Perez

Subject: Adoption of Board of Health Regulation restricting smoking in restaurants

Background

1. County Code §2-65, as amended effective August 10, 2000, provides that the County Council is, and may act as, the County Board of Health, and in that capacity may adopt any regulation which a local Board of Health is authorized to adopt under state law.
2. Maryland Code Health-General Article §3-202(d) authorizes the County Board of Health to adopt rules and regulations regarding any nuisance or cause of disease in the County. In addition, state law codified as Montgomery County Code §24-1 authorizes the County Board of Health to adopt and enforce regulations concerning sanitation for eating and drinking establishments. Various provisions of state law, including Maryland Code Health-General Article §24-505(a) and Chapter 5, Acts 1995, §2, confirm the legislature's intent that counties are not preempted from restricting smoking in establishments open to the public where smoking is permitted under state law.
3. On (date), 2003, the County Council held a public hearing on this regulation and Bill -03, Smoking - Eating and Drinking Establishments. Bill -03 would amend County Code §24-9, Smoking in Public Places, and repeal §24-9A, Smoking in Eating and Drinking Establishments. As required by law, each municipality in the County and the public were properly notified of this hearing.
4. The County Council, sitting as the Board of Health, finds after hearing the testimony and other evidence in the record of the public hearing that restricting smoking in eating and drinking establishments is necessary to promote sanitation in eating and drinking establishments and protect the health and safety of restaurant employees and patrons in the County.

Action

The County Council for Montgomery County, Maryland, sitting as the County Board of Health, approves the following regulation:

Smoking in eating and drinking establishments

- (a) **Smoking Prohibited.** A person must not smoke any tobacco product in any eating and drinking establishment licensed under Chapter 15 of the County Code. The owner or person in control of the establishment must refuse to serve or seat any person who smokes, and must direct the person to leave if the person continues to smoke after proper warning. The owner or person in control of the establishment must prominently post at each public entrance at least one sign which indicates that smoking is not allowed.
- (b) **Exception.** This regulation does not apply in the bar and dining area of any eating and drinking establishment that:
 - (1) is a club as defined in the state alcoholic beverages law,
 - (2) has an alcoholic beverages license issued to private clubs under the state alcoholic beverages law, and
 - (3) allows consumption of alcoholic beverages on its premises.
- (c) **Enforcement.**
 - (1) Any violation of this regulation is a class C civil violation. Each day a violation exists is a separate offense.
 - (2) The County Attorney or any affected party may file an action in a court with jurisdiction to enjoin repeated violations of this regulation.
 - (3) The Department of Health and Human Services must investigate each complaint alleging a violation of this regulation and take appropriate action, including issuing a citation when compliance cannot be obtained otherwise.
 - (4) When an eating and drinking establishment is inspected by the Department of Health and Human Services for compliance with Chapter 15, the Department must verify compliance with this regulation. When an eating and drinking establishment is inspected by the staff of the Board of License Commissioners for compliance with applicable alcoholic beverages laws, the staff must verify compliance with this regulation and forward any evidence of noncompliance to the Department for enforcement.

- (5) The Director of Health and Human Services may suspend a license issued under Chapter 15 for up to 3 days if the Director finds, under the procedures of Section 15-16, that the operator of an eating and drinking establishment has knowingly and repeatedly violated this regulation.
- (d) **Applicability.** This regulation applies Countywide.
- (e) **Definitions.** Any term used in this regulation has the same meaning as in Section 24-9 of the County Code if defined in that Section.
- (f) **Severability.** If the application of this regulation, or any part of it, to any facts or circumstances is held invalid, the rest of the regulation and its application to all other facts and circumstances is intended to remain in effect.
- (g) **Effective Date.** This regulation takes effect 90 days after Council adoption.

This is a correct copy of Council action.

Mary A. Edgar, CMC
Clerk of the Council

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LEGISLATIVE REQUEST REPORT

Bill 15-03

Smoking – Eating and Drinking Establishments

DESCRIPTION:	Prohibits smoking in all eating and drinking establishments (restaurants, cafeterias, dinner theaters, school and institutional food service facilities) except certain private clubs with liquor licenses.
PROBLEM:	The current County law regulating smoking in eating and drinking establishments (County Code §24-9A) only requires that a nonsmoking area must be available in any establishment that seats 50 or more persons. It does not require separate ventilation or any other measure to direct secondhand smoke away from non-smokers and employees. The state's stricter workplace smoking regulation does not apply in restaurants. Since the state prohibited smoking in virtually all workplaces and restricted smoking in restaurants by law and regulation in 1994 and 1995, this part of County law is weaker than state law.
GOALS AND OBJECTIVES:	To more fully protect restaurant patrons and employees from the health effects of secondhand smoke and other dangers of smoking.
COORDINATION:	County Department of Health and Human Services
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	Similar law, but with exception for separately ventilated rooms, has been in effect in Howard County, California, Delaware, Boston, and New York City, among others, prohibit smoking in most or all restaurants.
SOURCE OF INFORMATION:	Michael Faden, Senior Legislative Attorney, 240-777-7905
APPLICATION WITHIN MUNICIPALITIES:	County smoking laws apply in Barnesville, Brookeville, Chevy Chase Section 3, Chevy Chase Section 5, Town of Chevy Chase, Chevy Chase View, Glen Echo, Martin's Addition, North Chevy Chase, Rockville, Takoma Park, and Washington Grove.
PENALTIES:	Class C civil violation. The license of an eating and drinking establishment can be suspended for up to 3 days for knowing and repeated violations.

Private Club/outdoor serving areas amendments

Delete ©2, lines 14-22, and insert the following on ©2, line 3:

(a) *Definitions.* In this Section, the following words and phrases have the meanings indicated:

(1) Eating and drinking establishment: An establishment regulated under Chapter 15, including:

(A) any outdoor serving area of an eating and drinking establishment;
and

(B) to the extent permitted by state law, any area of a private club that is licensed as an eating and drinking establishment.

FABILLS03xx Restaurant Smoking/Private Club Exemption.Doc

§ 2-105

ANNOTATED CODE OF MARYLAND

(f) *Limitation on authority and duties.* — The Secretary may not exercise or perform any power, duty, responsibility, or function granted to the Board of Appeals in §§ 8-504, 8-506, 8-509, 8-510, 8-511, 8-512, 8-611(j), 8-629(f), 8-638, 8-639, and 8-808(a) of the Labor and Employment Article. (An. Code 1957, art. 41, §§ 8-104, 8-105; 1992, ch. 4, § 2; 1997, ch. 14, § 1.)

Effect of amendments. — The 1997 amendment, approved Apr. 8, 1997, and effective from date of enactment, added (f).

§ 2-105. Regulations.

(a) *In general.* — The Secretary may adopt regulations for the Office of the Secretary.

(b) *Regulations of units — Submission for review.* — Before a unit in the Department publishes a proposed regulation under § 10-112 of the State Government Article, the unit shall submit the proposed regulation to the Secretary.

(c) *Same — Action by Secretary.* — (1) Except as provided in subsection (d) of this section, the Secretary may approve any proposed regulation.

(2) Within 30 days after submission of a proposed regulation on a regulatory, supervisory, quasi-judicial, disciplinary, or enforcement function of a unit, the Secretary may disapprove the proposed regulation but only if the Secretary finds that it:

(i) would discourage competition within a regulated occupation or profession;

(ii) would unfairly restrict entry of applicants into a regulated occupation or profession; or

(iii) otherwise is contrary to the public interest.

(3) The Secretary may disapprove or revise any other proposed regulation.

(d) *Permissible locations.* — (1) (i) Notwithstanding any regulations adopted by the Secretary under this section, the smoking of tobacco products is permitted in any of the following locations unless restricted as authorized under paragraph (3) of this subsection:

1. any portion of a private residence which is not open to the public for business purposes;

2. any establishment that:

A. is not a restaurant or hotel as defined in Article 2B, § 1-102 of the Code;

B. possesses an alcoholic beverages license issued under Article 2B of the Code that allows consumption of alcoholic beverages on the premises of the establishment; and

C. is generally recognized as a bar or tavern;

3. a bar in a hotel or motel;

4. a club as defined in Article 2B, § 1-102 of the Code that possesses an alcoholic beverages license issued under Article 2B of the Code and that allows consumption of alcoholic beverages on the premises of the club;

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5. in the case of a restaurant as defined in Article 2B, § 1-102 of the

Code:

A. if the restaurant does not possess an alcoholic beverages license issued under Article 2B of the Code, a separate enclosed room not to exceed 40% of the total area of the restaurant; or

B. if the restaurant possesses an alcoholic beverages license issued under Article 2B of the Code, a bar or bar area, a separate enclosed room not exceeding 40% of the restaurant, or a combination of a bar or bar area and a separate enclosed room not exceeding 40% of the total area of the restaurant including the bar or bar area;

6. up to 40% of the sleeping rooms in a hotel or motel;

7. a separate enclosed room of an establishment other than an establishment specified in items 1 through 6 of this subparagraph that possesses an alcoholic beverages license issued under Article 2B of the Code that allows consumption of alcoholic beverages on the premises of the establishment; or

8. up to 40% of the premises of a fraternal, religious, patriotic, or charitable organization or corporation or fire company or rescue squad that is subject to the authority of the Secretary during an event that the organization or corporation holds on its own property and which is open to the public.

(ii) A separate enclosed room in which smoking is permitted under subparagraph (i) of this paragraph is not required to have a specially modified ventilation system for the room.

(2) For the purposes of paragraph (1)(i)5B of this subsection, "bar or bar area" means an area within a restaurant that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is incidental to the consumption of the alcoholic beverages, and the immediately adjacent seating area.

(3) Notwithstanding the provisions of this subsection, a proprietor of an establishment described in paragraph (1) of this subsection may restrict or prohibit smoking on the premises of the establishment. (An. Code 1957, art. 41, § 8-104; 1992, ch. 4, § 2; 1995, ch. 5.)

Editor's note. — Section 2, ch. 5, Acts 1995, provides that "this Act is not intended to preempt the authority of a county or municipal corporation to enact any law or ordinance that is more restrictive of smoking in establishments open to the public in which smoking is permitted under § 1 of this Act."

Maryland Law Review. — For note, "The Maryland Survey: 1994-1995," see 55 Md. L. Rev. 529 (1996).

Effect of State and local smoking laws. — Both State law and county law apply to a

restaurant in Talbot County with an alcoholic beverages license; the combined effect of these laws is that such a restaurant may establish a smoking area only in a "bar," as defined in Article 23 of the County Code, and a smoking area in a bar may not exceed 40% of the total area of the restaurant, as specified in Chapter 5, Acts 1995. 80 Op. Att'y Gen. — (Sept. 29, 1995).

§ 2-106. Licensing Testing Fund.

(a) *Established.* — There is a Licensing Testing Fund for the Department.

Evolution of Montgomery County smoking laws

- 1977 Prohibited smoking in elevators, retail stores where more than 8 persons work at any time, public areas of health care facilities, public schools, County government facilities, and theaters. Exceptions: private enclosed offices, when facilities are closed to the public, central areas of malls, barbershops, and beauty shops (Bill 26-76, effective 5-5-77)
- 1979 Required patient rooms in hospitals to be nonsmoking unless otherwise requested by all occupants. (Bill 53-79, effective 3-12-80)
- 1981 Required employers to "consider the needs of nonsmoking employees and ... accommodate their need to the extent possible." (Bill 53-81, effective 11-15-82)
- 1986 Prohibited smoking in rail transit stations and most County government workplaces. Exceptions to the workplace prohibition: designated smoking areas, private enclosed offices. (Bill 27-85, effective 4-28-86)
- 1987 Required all restaurants with at least 50 seats to have a no-smoking area covering at least 50% of the total seating area (Bill 1-87, effective 7-10-87)
- 1988 Prohibited smoking in public areas of offices, retail stores, banks, factories, and other private businesses. Exceptions: mom & pop stores (where no more than 2 persons work at any time), private functions not open to the public. Also prohibited smoking in public restrooms and auditoriums. (Bill 27-87, effective 6-9-88)
- 1990 Prohibited smoking in shared workplaces, and required employers to post notices and inform employees. Exceptions: mom & pop businesses, other businesses when all employees sharing the workplace consent. (Bill 51-89, effective 5-24-90)
- 1992 Prohibited sale of tobacco products from vending machines, except in private clubs. (Bill 5-91, 64-91, effective 5-1-92) County law declared invalid by Circuit Court 4-19-93; Court of Appeals declared similar laws from cities of Bowie and Takoma Park preempted by state law later in 1993.
- 1994 Prohibited smoking in all County government workplaces, with no designated smoking areas. (Bill 42-93, effective 5-2-94)

- 1999 Conformed County law to state workplace smoking regulations by dropping references to workplaces in County law, thus focusing County law on public places (Bill 3-99, effective 6-29-99)
- 1999 Prohibited smoking in all restaurants (Council Resolution 14-70, adopting Board of Health regulation). Regulation declared invalid because of improper adoption by Maryland Court of Appeals 5-2-03.

F:\TOPICS\Smoking\History Of Smoking Laws.DOC

IN THE COURT OF APPEALS OF MARYLAND

No. 91

September Term, 2000

MONTGOMERY COUNTY, MARYLAND, et al.

v.

ANCHOR INN SEAFOOD RESTAURANT, et al.

Bell, C.J.
Eldridge
Raker
Wilner
Cathell
Harrell
Battaglia,

JJ.

Opinion by Eldridge, J.

Filed: May 2, 2003

We issued a writ of certiorari in this case to determine the validity of a Montgomery County regulation that prohibits smoking in eating and drinking establishments other than private clubs. We shall hold that the regulation is invalid.

I.

On January 19, 1999, Bill No. 2-99, banning smoking in licensed bars and restaurants in Montgomery County, was introduced in the Montgomery County Council. Following a hearing, the bill passed by a five to four vote and was delivered to the County Executive, who vetoed it. On the same date that the bill was passed, the County Council purported to convene as the Board of Health and considered adopting, by resolution, a regulation that mirrored Bill No. 2-99. Resolution 14-70 was adopted on March 9, 1999, to take effect on January 1, 2002. It provided, in pertinent part, as follows:

"Smoking in eating and drinking establishments

- (a) **Smoking Prohibited.** A person must not smoke any tobacco product in any eating and drinking establishment licensed under Chapter 15 of the County Code. The owner or person in control of the establishment must refuse to serve or seat any person who smokes, and must direct the person to leave if the person continues to smoke after proper warning.

* * *

- "(b) **Exception.** This regulation does not apply in the bar or dining area of any eating and drinking establishment that:
- (1) is a club as defined in the state alcoholic beverages law,
 - (2) has an alcoholic beverages license issued to private clubs under the state alcoholic

- (3) beverages law, and
allows consumption of alcoholic beverages
on its premises."

The purported legal basis for Resolution 14-70 was set forth in the Resolution, and states in pertinent part as follows:

"Maryland Code Health-General Article § 3-202(d) authorizes the County Council, sitting as the County Board of Health, to adopt rules and regulations regarding any nuisance or cause of disease in the County."

Following the adoption of the Resolution, the respondents, Anchor Inn Seafood Restaurant, numerous other restaurants located in Montgomery County, restaurant owners and employers (collectively referred to as "Anchor Inn") and the City of Gaithersburg, filed in the Circuit Court for Montgomery County these declaratory judgment actions challenging the validity of the Resolution. After cross-motions for summary judgment, the Circuit Court entered a judgment declaring the Resolution invalid. In a separate opinion accompanying the declaration that the Resolution was invalid, the Circuit Court delineated five alternative grounds for its decision. First, the court held that, under state law, the County Council did not have the authority to sit as the Board of Health without the participation of the County Executive. Second, the Circuit Court held that the Resolution was preempted by Maryland Code (1992, 1998 Repl. Vol.), § 2-105(d) of the Business Regulation Article. Third, the court concluded that the County Council, purporting to sit as an administrative agency, failed to comply with the Montgomery County Administrative Procedure Act. Fourth, the court took the position that the Resolution violated the separation of powers provisions in the

Montgomery County Charter. Fifth, the Circuit Court held that the Resolution violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection principle embodied in Article 24 of the Maryland Declaration of Rights.

Montgomery County filed a notice of appeal to the Court of Special Appeals, and then petitioned this Court for a writ of certiorari prior to any proceedings in the Court of Special Appeals. We granted the certiorari petition, *Montgomery County Council v. Anchor Inn*, 361 Md. 433, 761 A.2d 932 (2000), and we shall affirm.

II.

We fully agree with the first ground relied upon by the Circuit Court for holding the Resolution invalid, namely that, under state law, the Montgomery County Council did not have the authority to act as the Board of Health without the participation of the County Executive. Consequently, we need not and shall not express any opinion with respect to the other alternative grounds relied upon in the Circuit Court's opinion.

Article XI-A of the Maryland Constitution authorizes counties to adopt home rule charters which, as we have often pointed out, function as "constitutions" for the counties adopting them. *Save Our Streets v. Mitchell*, 357 Md. 237, 248, 743 A.2d 748, 754 (2000), and cases there cited. Section 3 of Article XI-A mandates that a county adopting a home rule charter must select one of two types of government: (1) an elective legislative body known as the County Council without an elected County Executive or (2) an elective County Council plus an elective County Executive.¹

¹ Article XI-A, § 3, provides in part as follows:

(continued...)

In accordance with Article XI-A of the Constitution, Montgomery County adopted in 1948 a home rule charter. In this original charter, Montgomery County opted for the system having no county executive and where the elected County Council comprised the governing body, having both legislative and executive powers. The original Charter, in Art. III, §§ 2 and 3, declared that the Council was the "chief executive authority" and vested the Council with "all powers of the Board of County Commissioners, or any of them, as a local board of health." In 1965, the County Council by ordinance again designated itself as the local Board of Health.

In 1968, however, Montgomery County adopted a new charter, effective in 1970, which provided for the other type of government authorized by Article XI-A of the Maryland Constitution, with a county executive and a separation of the county government into legislative and executive branches. See *Eggert v. Montgomery County Council*, 263 Md. 243, 256-260, 282 A.2d 474, 480-482 (1971), where this Court discussed the new charter and the Montgomery County Council's invalid efforts to exercise executive powers under the new charter.

¹ (...continued)

"Every charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said City or County. Such legislative body in the City of Baltimore shall be known as the City Council of the City of Baltimore, and in any county shall be known as the County Council of the County. The chief executive officer, if any such charter shall provide for the election of such executive officer, or the presiding officer of said legislative body, if such charter shall not provide for the election of a chief executive officer, shall be known in the City of Baltimore as Mayor of Baltimore, and in any County as the President or Chairman of the County Council of the County, and *all references in the Constitution and laws of this State to the Mayor of Baltimore and City Council of the City of Baltimore or to the County Commissioners of the Counties, shall be construed to refer to the Mayor of Baltimore and City Council of the City of Baltimore and to the President or Chairman and County Council herein provided for whenever such construction would be reasonable. * * **" (Emphasis supplied).

The Maryland General Assembly, as early as 1886, has authorized the governing bodies of counties, which were then county commissioners in all counties, to constitute the county boards of health. Ch. 22, § 2, of the Acts of 1886 stated that

"the Board of County Commissioners of the several counties in this State shall, ex-officio, constitute a Local Board of Health for their respective counties, and shall have and exercise all the duties of a Board of Health, as provided in this act"

In December 1970 and thereafter, when Montgomery County's new charter went into effect, the state statute was virtually the same as when it was enacted in 1886. Maryland Code (1957, 1971 Repl. Vol.), Art. 43, § 45, provided in relevant part as follows:

"The board of county commissioners of the several counties in this State shall, ex officio, constitute a local board of health for their respective counties and shall have and exercise all the duties of a board of health as provided in this article except in cases where the charter of any city or town in the State contains provisions inconsistent therewith."²

As reenacted and recodified by Ch. 21, § 2, of the Acts of 1982, Maryland Code (1982, 2000 Repl. Vol.), § 3-201 of the Health-General Article, the provision now reads as follows:

"§ 3-201. County governing body or designated board.

(a) *In general.* – Except as provided in subsection (b) of this section, the governing body of a county is ex officio the board of health for the county.

(b) *Code or charter county.* – In a code county or charter county, the governing body is ex officio the board of health for the county, unless the governing body establishes a board of health."

² There was a limited exception for Montgomery County in the second paragraph of the statute, but the exception concerned only chartered municipalities within the County.

Montgomery County has not by ordinance established a separate entity as a Board of Health. Accordingly, the critical issue in this case is whether the "governing body" of Montgomery County, for purposes of § 3-201 of the Health-General Article, is the County Council alone, or is the County Council and County Executive together.

It is clear that, after 1948 and until the latter part of 1970, the County Council of Montgomery County constituted the local Board of Health. The 1948 Charter provision and the 1965 ordinance, designating the County Council alone as the Board of Health, were consistent with former Art. 43, § 45, providing that the County Commissioners constituted the local Board of Health. Under the explicit language of Article XI-A, § 3, of the Maryland Constitution, the reference to the Board of County Commissioners in the state statute should "be construed to refer to the . . . County Council herein provided for" From 1948 until December 1970, the County Council of Montgomery County was the "governing body" of Montgomery County.

From and after December 1970, however, when the new Montgomery County Charter went into effect, the County Council alone was clearly no longer the local Board of Health. The adoption of the County Executive - County Council form of local government was a major change with obvious consequences for future enactments. Under Article XI-A, § 3, of the Maryland Constitution, the language in Art. 43, § 45, of the Maryland Code, referring to the "Board of County Commissioners," meant the County Council and County Executive together.

In *County Council v. Supervisor*, 274 Md. 116, 117, 332 A.2d 897, 898 (1975), this Court held that "the County Council of Montgomery County is not synonymous with the term

'county commissioners'." In reviewing the provisions of Art. XI-A of the Maryland Constitution, in a charter county, we held that the corporate body of Montgomery County comprises the Executive and the Council together, as the successor to the former county commissioners. Judge Smith explained for the Court (274 Md. at 123, 332 A.2d at 900-901):

"When one considers the fact that at the time of the adoption of Art. XI-A the corporate name of the City of Baltimore was 'Mayor and City Council of Baltimore,' that by the provisions of Art. 25, § 1 county commissioners of each county are 'declared to be a corporation,' that one would hardly expect to call the chief executive officer of a county 'mayor,' and the words 'President and County Council' are an approximation of 'Mayor of Baltimore and City Council of the City of Baltimore,' it becomes obvious to us that the intent of the framers of the amendment was to refer to the county in its corporate capacity, by whatever name it might ultimately be known upon the adoption of a charter. Accordingly, we conclude that it is the corporate entity of Montgomery County, Maryland, so known in its charter, which is vested with the right of appeal . . . in lieu of the prior corporate entity, the County Commissioners of Montgomery County."

Earlier, in *Barranca v. Prince George's County*, 264 Md. 562, 287 A.2d 286 (1972), we held that the County Executive and the County Council together comprised the corporate governing body of Prince George's County. In that case, the County Executive claimed to have the authority to act alone to remove a Prince George's County member of the Washington Suburban Sanitary Commission from office. We held that the "power of removal . . . lies in the hands of both the County Executive and the County Council," when the relevant statute vested the authority in the corporate body. *Barranca v. Prince George's County*, *supra*, 264 Md. at 571, 287 A.2d at 291.

Moreover, this Court has consistently taken the position that, with respect to home rule

counties with both an executive and a council, the reference to "governing body" of a county, without further definition, means the executive and council together. Thus, in *County Council of Harford County v. Maryland Reclamation Associates*, 328 Md. 229, 614 A.2d. 78 (1992), we held that the Harford County Council acting by itself was not the "governing body" of the county. The County Council in that case, as in the instant case, purported to adopt a regulation without the participation of the County Executive. The Harford County Council argued that "the provisions of Maryland Code (1982, 1987 Repl. Vol., 1992 Cum. Supp.), §§ 9-501 through 9-521 of the Environment Article, authorize[d] the 'County Council' itself to adopt, review, revise and amend Harford County's Solid Waste Management Plan." *County Council of Harford County v. Maryland Reclamation Associates, supra*, 328 Md. at 234, 614 A.2d. at 81. But the state statute granted the authority to the "county governing body," not the Council. As we pointed out, 328 Md. at 236 n.3, 614 A.2d at 82 n.3, even though the Environment Article did not define the term "county governing body," the

"Legislature elsewhere has defined the term to mean, in a charter county, the council and executive together. See, e.g., Code (1974, 1990 Repl. Vol.), § 8-701(d) of the Natural Resources Article ("Governing body" means the county commissioners, county executive and county council of any county . . .'); Code (1978, 1989 Repl. Vol.), § 5-102(c)(1) of the Education Article ('county governing body . . . consists of a county executive and county council')."

Accordingly, we held that the Council, acting alone, without the participation of the County Executive, lacked the authority to adopt or amend the County's Solid Waste Management Plan.

No ordinance passed by the Montgomery County Council and signed by the Montgomery County Executive has created a separate Board of Health for Montgomery

County. Consequently, under § 3-201 of the Health-General Article of the Maryland Code, the "governing body" of Montgomery County is the local Board of Health. After 1970, the governing body has consisted of the County Council and County Executive together, and not the Council acting alone. Since the challenged Resolution was passed by the Council acting alone, it is invalid.

JUDGMENT AFFIRMED, WITH COSTS.

Emergency Bill No. 20-00
 Concerning: Board of Health -
 Designation
 Revised: 7-27-00 Draft No. 4
 Introduced: June 27, 2000
 Enacted: August 1, 2000
 Executive: August 10, 2000
 Effective: August 10, 2000
 Sunset Date: None
 Ch. 25, Laws of Mont. Co. 2000

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President Subin and Councilmembers Leggett, Andrews, and Ewing

AN EMERGENCY ACT to:

- (1) reaffirm that the County Council acts as the County Board of Health and has all the powers of a local board of health under state and County law;
- (2) confirm that the County Council, sitting as the Board of Health, need not follow certain administrative procedures when adopting regulations; and
- (3) generally amend County law regarding the composition, authority, and duties of the Board of Health.

By amending

Montgomery County Code
 Chapter 2, Administration
 Section 2-65

Chapter 2A, Administrative Procedures Act
 Section 2A-12

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 2-65 and 2A-12 are amended as follows:**

2 **2-65. Board of health [created] designated.**

3 [There is hereby established a county board of health which shall have and
4 exercise all the powers of a local board of health as provided in article Health-
5 General, title 3, subtitle 2, Annotated Code of Maryland, 1957, as amended. The
6 county council is hereby designated as the county board of health.]

7 (a) The County Council is, and may act as, the County Board of Health.

8 (b) When meeting as the Board of Health, the County Council has all the
9 powers delegated to a local board of health under State and County
10 law.

11 (c) The County Council, meeting as the Board of Health, may adopt any
12 regulation which a local board of health is authorized to adopt.
13 Before it adopts a regulation, the Board must hold a public hearing
14 after giving reasonable notice, as specified in the Council Rules of
15 Procedure, to each municipality in the County and the public.

16 **2A-12. [Declaration of policy and legislative intent] Policy and scope of**
17 **Article.**


18 (a) *Purpose.* It is the purpose of this Article to prescribe a single and
19 consistent procedure for the adoption, review and repeal of
20 regulations, and to provide a uniform procedure for their public
21 notification and compilation.

22 (b) *Scope.* Unless otherwise provided, this Article applies to all
23 regulations. However, this Article does not apply to the County
24 Council, meeting as the Board of Health, when it adopts a regulation.

25 **Sec. 2. Emergency Effective Date.** The Council declares that an
26 emergency exists and that this legislation is necessary for the immediate protection
27 of the public health and safety. This Act takes effect on the date on which it

28 becomes law.

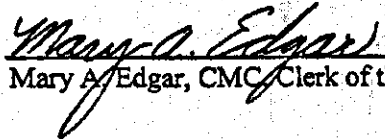
29 *Approved:*

30  8/3/2000
Michael L. Subin, President, County Council Date

31 *Approved:*

32  8/10/00
Douglas M. Duncan, County Executive Date

33 *This is a correct copy of Council action.*

34  8/14/00
Mary A. Edgar, CMC Clerk of the Council Date